

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JESSICA WILLIAMS,

Petitioner,

vs.

CHRISTINE BODO, *et al.*,

Respondents.

2:04-cv-01620-KJD-LRL

ORDER

This represented habeas action under 28 U.S.C. § 2254 comes before the Court on petitioner's motion (#89) for a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005).

In order to seek a *Rhines* stay to return to the state courts to exhaust a claim or claims, the petitioner must demonstrate that there was good cause for the failure to exhaust the claims, that the unexhausted claims include at least one claim that is not plainly meritless, and that petitioner has not engaged in intentionally dilatory litigation tactics. See 544 U.S. at 278, 125 S.Ct. 1535.

Respondents contend that petitioner has failed to show that the unexhausted claims in Grounds 6 and 8 are not plainly meritless, focusing initially upon Ground 8.

Ground 8 includes unexhausted claims that petitioner was denied due process of law in violation of the Fourteenth Amendment because: (a) she was denied fair warning under the relevant statutory language that having marijuana metabolite in her blood would subject her to criminal liability; and (b) the state supreme court's allegedly unforeseeable and retroactive

1 judicial expansion of the statute to include the metabolite as a prohibited substance also
2 deprived her of fair warning.

3 Respondents contend that these claims are plainly meritless because the state
4 supreme court's decision consisted of simply a straightforward application of established
5 principles of statutory construction "known to all courts." Respondents urge that the decision
6 applied simple rules of interpretation "familiar to any court" and that "[t]o practitioners of
7 Nevada law, the decision was unremarkable." #90, at 3 & n.1. Respondents accordingly
8 maintain that "[b]ecause there has been no credible showing on at least one of the mandatory
9 *Rhines* factors, the motion should be denied." *Id.*, at 4.

10 The undersigned has been a member of the Nevada bar for forty years, actively
11 practiced as a Nevada lawyer for over twenty years, served five years on the state bench, and
12 regularly has applied Nevada law as a federal judge sitting in this state for over a decade.
13 The undersigned observed as follows in the prior order as to these claims:

14 While the Supreme Court of Nevada undeniably is the final
15 arbiter of Nevada state law, the state supreme court's reading of
16 the relevant state statutes in this case is – at best – problematic.
17 The state high court's decision in *Williams II* arguably glosses
18 over the fact that N.R.S. 484.1245 is not merely "another statutory
19 provision" in "the same statutory scheme." Rather, under the
20 most natural reading of the three statutes in question, N.R.S.
21 484.1245 arguably provides *the* definition of "prohibited
22 substance" applicable to the other provisions, which by their
23 express terms do not define "prohibited substance."

24 As noted, however, the Supreme Court of Nevada is the
25 final arbiter of Nevada state law. A federal court, including even
26 the United States Supreme Court, clearly cannot substitute its
27 own judgment for that of the Supreme Court of Nevada on a
28 question of Nevada state law. The state supreme court's decision
in *Williams II* essentially "cuts the legs out from under" petitioner's
claim that *Griffin* and *Leary* require a new trial because marijuana
metabolite is not a prohibited substance under the relevant
Nevada statutes. This Court cannot look behind the state
supreme court's holding on the state law predicate required for
that federal claim. *See, e.g., Medley v. Runnels*, 506 F.3d 857,
862 (9th Cir. 2007).

Review of federal due process claims based upon the
failure of the statute, or a judicial construction thereof, to provide
fair warning as to prohibited conduct is another matter, however.
Such claims clearly are within the cognizance of a federal court
on federal habeas review. *See, e.g., Medley, supra*.

1 In this particular case, however, it would appear that
 2 petitioner's fair-warning due process claims were not fairly
 3 presented to the state courts and exhausted. To exhaust a claim,
 4 *both* the factual basis *and* the specific federal legal theory upon
 5 which the petitioner's claim is based must be fairly presented to
 6 the state courts. *E.g., Castillo, supra*. The Court does not have
 7 the discretion to simply ignore the exhaustion doctrine, except
 8 where it is dismissing a claim for lack of merit. See 28 U.S.C. §
 9 2254(b)(2). . . .

10 Williams' fair-warning due process claims do not appear to
 11 be subject to dismissal on their face, as, indeed, the claims would
 12 appear to have substantial arguable merit. The only option left to
 13 this Court therefore is to direct petitioner to show cause why the
 14 petition is not subject to dismissal as a mixed petition unless the
 15 unexhausted claims are dismissed and/or petitioner seeks other
 16 appropriate relief in this regard.

17 #78, at 9-10 (emphasis in original; footnote omitted).

18 Regardless of what purportedly may be unremarkable to Nevada practitioners and/or
 19 known or familiar to "any court," *this* Court is not persuaded that the fair warning claims in
 20 Ground 8 are plainly meritless. Rather, the Court remains of the view, as it clearly stated in
 21 the prior order, that the claims "would appear to have substantial arguable merit."

22 Respondents otherwise provide no points and authorities specifically challenging
 23 petitioner's arguments as to good cause and the absence of intentionally dilatory litigation
 24 tactics. Respondents failure to provide such points and authorities constitutes a consent to
 25 the grant of the motion under Local Rule LR 7-2(d) as to these issues if the sole argument
 26 that they present falls short. The Court in any event further finds on the showing and
 27 arguments made that petitioner has demonstrated good cause and the absence of
 28 intentionally dilatory litigation tactics.

A stay accordingly is appropriate as to the unexhausted claims in Ground 8.

Given the appropriateness of a stay with regard to the unexhausted claims in Ground
 8, the Court expresses no opinion as to whether the circumstances pertaining to Ground 6,
 standing alone, would be sufficient to make a stay appropriate. With a stay ordered based
 on the circumstances pertaining to Ground 8, the question of what additional claim or claims
 should be presented to the state courts is a matter for petitioner to determine when seeking
 relief in those courts.

1 In this regard, the Court noted in the prior order that no record citation had been
 2 provided in support of the claims in Ground 6 establishing that the laboratory report witness
 3 had testified falsely. See #78, at 10 n.9. Respondents suggest that this note establishes that
 4 the claim is speculative and conclusory. However, the note establishes merely what it says,
 5 that the Court had not been provided a record citation supporting the claim as yet.¹

6 Respondents urge that entry of a stay in this matter would offend the policy objectives
 7 canvassed in *Rhines*. A stay in this matter, however, is fully consonant with *Rhines*, which
 8 canvassed not only the policy objectives that weigh generally against stays in habeas matters
 9 but also those served by a stay in an appropriate case:

10 On the other hand, it likely would be an abuse of discretion
 11 for a district court to deny a stay and to dismiss a mixed petition
 12 if the petitioner had good cause for his failure to exhaust, his
 13 unexhausted claims are potentially meritorious, and there is no
 14 indication that the petitioner engaged in intentionally dilatory
 15 litigation tactics. In such circumstances, the district court should
 16 stay, rather than dismiss, the mixed petition. See [*Rose v.*] *Lundy*,
 455 U.S., at 522, 102 S.Ct. 1198 (the total exhaustion
 requirement was not intended to “unreasonably impair the
 prisoner’s right to relief”). In such a case, the petitioner’s interest
 in obtaining federal review of his claims outweighs the competing
 interests in finality and speedy resolution of federal petitions.

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17 544 U.S. at 278, 125 S.Ct. at 1535.

18 The motion for a stay accordingly will be granted, as per the remaining provisions of
 19 this order.

20 The Court expresses no opinion -- by this order -- as to whether the circumstances
 21 presented satisfy the cause and prejudice standard with respect to any claim of procedural
 22 default. The holding herein should not be read as an express or implied holding on this issue
 23 or any other issue. The Court holds here only that the criteria for a stay under *Rhines* have
 24 been satisfied, and its holding in this order is expressly limited to that specific context.

25
 26 ¹Moreover, as noted in the prior order, the United States Supreme Court has granted a petition for
 27 *certiorari* to consider a potentially related issue of whether the admission of a laboratory report offered to
 28 prove a driver’s blood alcohol content violates the Confrontation Clause when the analyst who prepared the
 report does not testify. See *State v. Bullcoming*, 147 N.M. 487, 226 P.3d 1 (2010), *cert. granted sub nom.*
Bullcoming v. New Mexico, 131 S.Ct. 62 (Sept. 28, 2010).

1 IT THEREFORE IS ORDERED that petitioner's motion (#89) for a stay and abeyance
2 is GRANTED and that this action is STAYED pending exhaustion of the unexhausted claims.
3 Petitioner may move to reopen the matter following exhaustion of the claims, and any party
4 otherwise may move to reopen the matter at any time and seek any relief appropriate under
5 the circumstances.

6 IT FURTHER IS ORDERED, as discussed in the prior order (#78, at 11), that this order
7 does not preclude, *inter alia*, petitioner from filing a limited motion to reopen the federal
8 proceedings during the stay for the purpose of amending the federal petition to present and
9 preserve claims, even if unexhausted, subject to the continued stay thereafter of the federal
10 proceedings pending exhaustion of the claims forming the basis for the stay.

11 IT FURTHER IS ORDERED that the grant of a stay is conditioned upon petitioner filing
12 a state post-conviction petition or other appropriate proceeding within, subject to reasonable
13 request for extension, forty-five (45) days of this order and returning to federal court with a
14 motion to reopen within forty-five (45) days of issuance of the remittitur by the Supreme Court
15 of Nevada at the conclusion of all state court proceedings.²

16 IT FURTHER IS ORDERED that, with any motion to reopen filed following completion
17 of all state court proceedings pursued, petitioner: (a) shall attach an indexed set of exhibits
18 (with the corresponding CM/ECF attachments identified by exhibit number(s) on the docketing
19 system) containing the state court record materials relevant to the issues herein that cover
20 the period between the state court exhibits on file in this matter and the motion to reopen; and
21 (b) if petitioner then intends to further amend the petition, shall file a motion for leave to
22 amend along with the proposed verified amended petition or a motion for extension of time
23 to move for leave.³ Respondents shall have thirty (30) days to file a response to the motion
24 or motions filed. The reopened matter will proceed under the current docket number.

26 ²If *certiorari* review is sought, either party may move to reinstate the stay for the duration of any such
27 proceedings. Cf. *Lawrence v. Florida*, 549 U.S. 327, 335, 127 S.Ct. 1079, 1084, 166 L.Ed.2d 924 (2007).

28 ³No claims in the current pleadings are dismissed by this order.

1 IT FURTHER IS ORDERED that the Clerk of Court shall ADMINISTRATIVELY CLOSE
2 this action until such time as the Court grants a motion to reopen the matter.

3 DATED: March 17, 2011

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KENT J. DAWSON
United States District Judge